

REMARKS/ARGUMENTS

In view of the following remarks, reexamination and reconsideration of this application, withdrawal of the rejections, and formal notification of the allowability of all claims as presented are earnestly solicited. Claims 1-24 are pending. In response to the Office Action, Applicant encloses a terminal disclaimer in compliance with in compliance with 37 C.F.R. §1.321(c) to overcome the rejections of pending Claims 5, 11, 17, and 22. Accordingly, it is believed that the pending claims define patentable subject matter over the prior art cited by the Examiner and notice to such effect is requested at the Examiner's earliest convenience.

Claim Rejections – 35 U.S.C. §101

Examiner has rejected Claims 1-3 under 35 U.S.C. §101 as claiming the same invention as that of Claims 1-3 of U.S. Patent No. 6,680,200 to Everett ("Everett"). Applicant respectfully submits that Claims 1-3 of the present application do not claim the same invention as that of Claims 1-3 of Everett.

More particularly, **Claim 1 of the present application claims that a "fixed number" of LED's** are positioned opposite a respective one of the wells. In contrast, **Claim 1 of Everett claims that "each" of the LED's** is positioned opposite a respective one of the wells. Thus, while Claim 1 of the present application includes embodiments wherein multiple LED's are positioned opposite each well, Claim 1 of Everett implies (with the term "each") that only a single LED is positioned opposite each well.

Thus, **Claim 1 of the present application could be literally infringed without literally infringing Claim 1 of Everett**, which is a "reliable test" for double patenting under 35 U.S.C. §101. See MPEP Chapter 804, Section II, Subsection A (citing *In re Vogel*, 422 F.2d 438, 164 U.S.P.Q. 619 (C.C.P.A. 1970)). In addition, Applicant respectfully submits that the terminology "fixed number" of LED's used in the pending Claim 1 is broader than corresponding language in Claim 1 of Everett such that Claims 1-3 of the present invention are not coextensive in scope with Claims 1-3 of Everett.

Claim Rejections – Non-Statutory Double Patenting

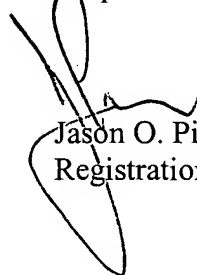
Examiner has rejected Claims 5, 11, 17, and 22 under the judicially-created doctrine of obviousness-type double patenting as being unpatentable over Claim 12 of Everett. While Applicant respectfully submits that Claims 5, 11, 17, and 22 of the present application are patentably distinct from Claim 12 of Everett, in the interest of a timely allowance of the pending claims of the present application Applicant encloses a terminal disclaimer in compliance with 37 C.F.R. §1.321(c) to overcome the rejections of pending Claims 5, 11, 17, and 22 as the present application is commonly owned by the assignee of Everett as required by 37 C.F.R. §1.130(b).

CONCLUSION

In conclusion, Claims 1-3 of Everett are not coextensive in scope with Claims 1-3 of the present application. In addition, Applicant encloses a terminal disclaimer in compliance with 37 C.F.R. §1.321(c) to overcome the non-statutory double patenting rejection of pending Claims 5, 11, 17, and 22. Accordingly, Applicant submits that the present invention, as defined by the pending claims, is patentable over the prior art cited in the Office Action. As such, for the reasons set forth above, Claims 1-24 are believed to be in condition for immediate allowance and notice to such effect is respectfully requested at the Examiner's earliest opportunity.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefore (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,



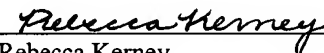
Jason O. Piché
Registration No. 53,468

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Customer No. 00826
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel Raleigh Office (919) 862-2200
Fax Raleigh Office (919) 862-2260

"Express Mail" mailing label number: EV387070650US
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Rebecca Kerney